Hearing Date and Time: March 30, 2010 at 10:00 a.m. (prevailing Eastern Time)
Objection Deadline: March 26, 2010 at 10:00 a.m. (prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re **THOMAS LUI,** **Debtor.**	**Chapter 7** **Case No. 09-14124 (ALG)**
MARINA DISTRICT DEVELOPMENT CO. LLC T/A BORGATA, **Plaintiff,** **v.** **THOMAS LUI,** **Defendant.**	**Adversary Proceeding** **No. 09-01508 (ALG)**

NOTICE OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

PLEASE TAKE NOTICE that upon the annexed Motion, dated March 1, 2010 (the "Motion"), Defendant Thomas Lui (the "Defendant"), will move for an order, pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) (as incorporated by Federal Rules of Bankruptcy Procedure 7012 and 7009), seeking a dismissal of the Complaint. A hearing will be held before the Honorable Allan L. Gropper, United States Bankruptcy Judge, in

Room 617 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, on March 30, 2010 at 10:00 a.m. (prevailing Eastern Time).

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, set forth the legal and factual basis therefor, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-242 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, and (b) by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with General Order M-182 (which can be found at www.nysb.uscourts.gov), and served in accordance with General Order M-242, and on (i) the chambers of the Honorable Allan L. Gropper, One Bowling Green, New York, New York 10004, Courtroom 617; (ii) Dewey & LeBoeuf LLP, attorneys for the Defendant, 1301 Avenue of the Americas, New York, New York 10019 (Attention: Michael P. Kessler, Esq., Paul J. Brodnicki II, Esq., and Kathryn A. Keen, Esq.); (iii) the Office of the United States Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004; and (iv) Craner, Satkin, Scheer & Schwartz, P.C., attorneys for the Plaintiff (Attention: M. Richard Scheer, Esq.), 320 Park Avenue, P.O. Box 367, Scotch Plains, New Jersey 07076, so as to be filed and actually received no later than March 26, 2010 at 10:00 a.m. (prevailing Eastern Time) (the "Objection Deadline").

If no objections are timely filed and served with respect to the Motion, the Defendant may, on or after the Objection Deadline, submit to the Bankruptcy Court an order dismissing the Complaint, which order may be entered with no further notice or opportunity to be heard or offered to any party.

Dated: March 1, 2010
New York, New York

DEWEY & LEBOEUF LLP

/s/ Michael P. Kessler

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UNITED STATES BANKRUPTCY COURT
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In re **THOMAS LUI, Debtor.**	**Chapter 7** **Case No. 09-14124 (ALG)**
MARINA DISTRICT DEVELOPMENT CO. LLC T/A BORGATA, Plaintiff, v. THOMAS LUI, Defendant.	**Adversary Proceeding No. 09-01508 (ALG)**

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Thomas Lui (the "Defendant") hereby files this motion (the "Motion") pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure (the "Federal Rules"), as incorporated by Rules 7012 and 7009 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), seeking dismissal of each of the claims asserted in the Adversary Complaint filed on October 6, 2009 (the "Complaint"), by plaintiff Marina District Development Co. LLC t/a Borgata (the "Plaintiff"), for the reasons that follow.

PRELIMINARY STATEMENT

1. Plaintiff glibly tosses around allegations of fraud and misrepresentation but neglects to plead facts necessary to support its allegations. Instead, Plaintiff supplies the Court with bare conclusions in support of its claims. Empty allegations fall well short of the pleading standards laid out in Federal Rules 12(b)(6) and 9(b). Viewed in light of Federal Rule 9(b)'s strict requirement that each element of claims sounding in fraud be pleaded with factual particularity, the Complaint's absence of specific factual allegations - and its resulting failure to state a claim – is even more striking and warrants dismissal.

2. Section 523(a)(2) Claims (Count I): Plaintiff asserts claims under subsections 523(a)(2)(A) and 523(a)(2)(B) of the Bankruptcy Code based upon Defendant's signature to two counter checks bearing a statement that cash was on deposit in Defendant's bank account to cover the cash proceeds of the checks. Subsection 523(a)(2)(A) of the Bankruptcy Code specifically provides it is inapplicable to statements regarding a debtor's financial condition, and subsection 523(a)(2)(B) applies only to statements regarding a debtor's financial condition.

3. Inasmuch as the sole alleged misrepresentation is the singular written statement, logically there can only be one claim upon which relief may be granted under subsection 523(a)(2)(A) or subsection 523(a)(2)(B). There cannot be a claim under both subsections, as a single statement cannot be both a statement not regarding a debtor's financial condition and a statement regarding a debtor's financial condition.

4. Whether the language of the alleged misrepresentation is or is not a statement regarding Defendant's financial condition is solely a legal issue that can be determined by the Court, as a matter of law, based on the words of Defendant's alleged statement.[1] No discovery is necessary to make this determination. Accordingly, this issue can and should be resolved by this Motion.

5. Dismissal of the remaining claim under section 523(a)(2) is appropriate on grounds that the Complaint fails to plead the required elements of false pretenses, false representation, or fraud, and fails to plead claims with the particularity required by Rule 9(b), which applies to section 523(a)(2) claims.

6. Section 727(a) Claims (Count II): Plaintiff's claims in Count II are barred by *res judicata*. Defendant has been granted a general discharge in his chapter 7 case, the discharge order is a final order, and cannot now be collaterally attacked. Therefore, these claims must also be dismissed.

7. Even if the claims in Count II are not barred by *res judicata*, the claims in Count II are too vague and conclusory to survive dismissal. The subsection 727(a)(4) claim must be dismissed because the Complaint fails to allege any acts by Defendant in connection with his chapter 7 case, as required by the statute. The subsection 727(a)(5) claim must also be dismissed because the Complaint fails to allege any facts relating to failure by the Defendant to explain a loss or deficiency of assets. Plaintiff pleads no facts in support of these claims, instead simply stating the legal conclusions that Defendant "has knowingly and fraudulently made a false oath or

[1] Resolution of this issue as a matter of law must be without prejudice to the Defendant's rights to defend any remaining cause of action on all legal and factual grounds.

account" and "has failed to explain satisfactorily any deficiency of assets to met [sic] his liabilities." Compl., Count II at ¶ 2.

8. Plaintiff's failure to plead any facts supporting the section 727(a) claims falls well short of the pleading requirements of Rule 12(b)(6). As with claims under section 523(a)(2), the heightened pleading requirements of Rule 9(b) also apply to claims under subsection 727(a)(4). In violation of the clear pleading requirements of Rules 12(b)(6) and 9(b), Plaintiff makes conclusory allegations, no doubt to mask the nonexistence of facts which would support such claims. A complaint comprised solely of conclusory allegations warrants dismissal under Rule 12(b)(6), because it fails to state a claim for relief that is plausible on its face.

9. The Complaint is a textbook example of the "shotgun approach" to pleading, with Plaintiff alleging acts of purported fraud with the hope that something might hit its target. Rules 12(b)(6) and 9(b), however, shield Defendant from such allegations. The alleged acts of fraud are supported by nothing more than conclusory statements, which are insufficient to state a claim, and mandate dismissal. For all of these reasons, and as explained in more detail below, the Complaint must be dismissed in its entirety.

BACKGROUND AND SUMMARY OF FACTS ALLEGED IN THE COMPLAINT

10. On June 25, 2009, Defendant commenced a case under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code"). On his schedules, Defendant reported approximately $3,100 in total assets, $114,000 in total liabilities, and net average monthly income of $2,200. $60,000 (or, more than 50%) of Defendant's liabilities consist of personal gambling debts, and the remainder is credit card debt. On

January 11, 2010, this Court entered an order granting Defendant a discharge under section 727 of the Bankruptcy Code (the "Discharge Order") [Docket No. 14].

11. The Complaint alleges the following facts:

(i) On January 10, 2009, Defendant executed a counter check, in the amount of $20,000, in favor of Plaintiff. Compl., Count I at ¶ 5. On January 17, 2009, Defendant executed a second counter check, in the amount of $20,000, in favor of Plaintiff. *Id.* Each counter check bore the following statement, printed above the signed signature line:

> I represent that I have received cash for the above amount and that said amount is on deposit in said bank or trust company in my name. It is free from claims and is subject to this check.

Compl., Count I at ¶ 9.

(ii) In exchange for each counter check, Defendant received gambling chips totaling $20,000. Compl., Count I at ¶ 5.

(iii) At the time Defendant executed and delivered to the Plaintiff such counter checks, there were insufficient funds in Defendant's account to pay the amount of the counter checks. Compl., Count I at ¶ 7.

(iv) On an unspecified date, Plaintiff presented both counter checks to Defendant's bank, HSBC Bank. Compl., Count I at ¶ 8. At that time, there were insufficient funds in Defendant's account. Compl., Count I at ¶ 11. The counter checks were returned without payment. *Id.*

(v) “Defendant was aware at the time he executed and delivered each such counter check that there were insufficient funds in his account to pay the amount of each counter check” and “Defendant had no reasonable expectation that he would be receiving or obtaining sufficient funds to deposit into his bank account to cover the amount of each such counter check.” Compl., Count I at ¶¶ 10, 12.

STANDARD OF REVIEW

12. A motion to dismiss under Federal Rule 12(b)(6) (“Rule 12(b)(6)”), made applicable by Bankruptcy Rule 7012(b), is “designed to test the legal sufficiency of the complaint, and thus does not require the Court to examine the evidence at issue.” *DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69 (2d Cir. 1996); *see also Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). “It is elementary that, on a motion to dismiss, a complaint must be read as a whole, drawing all inferences favorable to the pleader.” *Yoder v. Orthomolecular Nutrition Inst., Inc.*, 751 F.2d 555, 562 (2d Cir. 1985) (citing *Conely v. Gibson*, 355 U.S. 41, 47-48 (1957)).

13. While a complaint need not include detailed factual allegations, the plaintiff must incorporate “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.*; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). “Determining whether a complaint states a plausible claim for

relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

14. A complaint warrants dismissal under Rule 12(b)(6) when it does not contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570); *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009). Conclusions, unsupported assertions, and labels must be ignored when evaluating the adequacy of the pleading. *Iqbal*, 129 S.Ct. at 1949. Allegations that are "no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1950.

15. The heightened pleading requirement imposed by Federal Rule 9(b) ("Rule 9(b)"), made applicable by Bankruptcy Rule 7009, further requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) applies to all claims relying on a purported fraud, "regardless of the cause of action in which they appear," because Rule 9(b) is needed to provide fair notice of a plaintiff's claim, and to safeguard a defendant's reputation from improvident charges of wrongdoing. *See Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004). Accordingly, the complaint must specify "particulars" of the alleged fraud, including facts giving rise to a "strong inference of fraudulent intent." *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 221 (S.D.N.Y. 2002).

16. Even where fraud is not an element of the claim, the allegations must satisfy Rule 9(b) if the claim is based on fraudulent conduct. *See Rombach v. Chang*, 355 F.3d at 171 ("Rule 9(b) . . . is not limited to allegations styled or

denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action.”).

17. Because allegations of fraud must be pled with particularity, fraud pleadings cannot be based upon information and belief where the fraud allegations are based on facts that are not peculiarly within the defendant’s knowledge. *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972). Even where facts pled on information and belief are peculiarly within the opposing party’s knowledge, they must be accompanied by a statement of the facts upon which the belief is based. *Id.*

ARGUMENT

I. THE SECTION 523(a)(2) CLAIMS IN COUNT I OF THE COMPLAINT SHOULD BE DISMISSED

18. Count I of the Complaint charges that Defendant’s execution of the counter checks bearing the preprinted statement regarding his bank account constitutes a debt incurred by “false pretenses, a false representation, and/or actual fraud,” (Compl., Count I at ¶ 13) and should be declared nondischargeable pursuant to subsections 523(a)(2)(A) and 523(a)(2)(B) of the Bankruptcy Code. However, as discussed below, Plaintiff cannot have a claim under both subsections. They are mutually exclusive. Further, the Complaint fails to plead with the required particularity the elements of Plaintiff’s remaining claim under Count I.

A. Plaintiff cannot have a claim under both subsections 523(a)(2)(A) and 523(a)(2)(B) of the Bankruptcy Code.

19. Subsections 523(a)(2)(A) and 523(a)(2)(B) are mutually exclusive. One statement or misrepresentation cannot support a claim under both subsections. *See Weiss v. Alicea (In re Alicea)*, 230 B.R. 492, 500 (Bankr. S.D.N.Y. 1999). While subsection 523(a)(2)(A) specifically provides it is inapplicable to statements regarding a

debtor's financial condition, subsection 523(a)(2)(B) covers only statements regarding a debtor's financial condition. *See Citik Ka Wah Bank Ltd. New York Branch v. Wong (In re Wong)*, 291 B.R. 266, 274 (Bankr. S.D.N.Y. 2003); *In re Alicea*, 230 B.R. at 500.

20. The Complaint does not state whether the statement printed on the counter checks was a statement regarding Defendant's financial condition. The term "financial condition," for purposes of subsection 523(a)(2), is not defined in the Bankruptcy Code and has become the subject of two differing theories of interpretation: the strict interpretation and the broad interpretation. *See In re Wong*, 291 B.R. at 276; *In re Chivers*, 275 B.R. 606, 614 (Bankr. D. Utah 2002). Bankruptcy courts in the Southern District of New York have adopted the strict interpretation. *See In re Wong*, 291 B.R. at 277; *In re Alicea*, 230 B.R. at 502.

21. Under the strict interpretation, statements relating to a debtor's financial condition are limited to those that involve the debtor's overall financial responsibility, net worth or ability to generate assets, and do not include statements regarding a single asset or liability. *See In re Wong*, 291 B.R. at 277; *see also In re Alicea*, 230 B.R. at 502. A strict interpretation of a "financial statement" includes, in the case of an individual debtor, income and debt statements that reflect a person's ability to pay an additional debt. *In re Wong*, at 276-77 (citing *Old Kent Bank-Chicago v. Price (In re Price)*, 123 B.R. 42, 45 (Bankr. N.D. Ill. 1991)). *See also In re Chivers*, 275 B.R. at 615; *Kloven v. Ramsey*, 1993 WL 181309 at *2 (D. Minn. Apr. 22, 1993) (a statement relating to financial condition is one concerning "overall financial health, net worth, or ability to generate income, as opposed to a statement concerning the status or quality of a single asset or liability"). The statement which forms the basis for the Complaint is a

statement regarding a single asset, an account at HSBC Bank. This statement is therefore not a statement relating to Defendant's financial condition.

B. Plaintiff fails to state a claim under subsection 523(a)(2)(B) of the Bankruptcy Code.

22. As noted above, the Complaint does not allege any written statement by Defendant as to his financial condition. The sole written statement alleged in the Complaint relates to a single asset and, as discussed above, such a statement does not constitute a statement as to financial condition. Accordingly, Plaintiff has failed to state a claim upon which relief may be granted under subsection 523(a)(2)(B) of the Bankruptcy Code and Plaintiff's 523(a)(2)(B) claim must be dismissed.

C. Plaintiff fails to state a claim under subsection 523(a)(2)(A) of the Bankruptcy Code.

23. A claim under subsection 523(a)(2)(A) must satisfy the heightened pleading requirements for fraud pursuant to Rule 9(b). *See S&T Bank v. Howard (In re Howard)*, 2009 Bankr. LEXIS 3743, at *5 (Bankr. S.D.N.Y. Nov. 25, 2009) (citing *In re Jacobs*, 403 B.R. 565, 574 (Bankr. N.D. Ill. 2009) and *In re Kanaley*, 241 B.R. 795, 803 (Bankr. S.D.N.Y. 1991)). Rule 9(b) requires a complaint alleging fraud to plead such an allegation with particularity. Fed. R. Civ. P. 9(b). The Complaint falls far short of meeting this rigorous standard of pleading, and must be dismissed.

24. Section 523(a) specifies which of the debtor's debts are excepted from discharge. Subsection 523(a)(2)(A) provides that an individual debtor will not be discharged from any debt for "money, property, [or] services . . . ." obtained by (1) false pretenses, (2) a false representation, or (3) actual fraud, other than a statement respecting the debtor's or an insider's financial condition. 11 U.S.C. § 523(a)(2)(A).

(i) False Pretenses

25. Under subsection 523(a)(2)(A), the term "false pretenses" is defined as "conscious deceptive or misleading conduct calculated to obtain, or deprive another of, property." *Gentry v. Kolver (In re Kovler)*, 249 B.R. 238, 261 (Bankr. S.D.N.Y. 2000). A false pretense has been held to be an implied misrepresentation or conduct intended to create a false impression. *See Chase v. Lubit (In re Chase)*, 372 B.R. 125, 128 (Bankr. S.D.N.Y. 2007) (citing *Voyatzoglou v. Hambley (In re Hambley)*, 329 B.R. 382 (Bankr. E.D.N.Y. 2005)).

26. To establish that a debt is nondischargeable as a debt obtained by false pretenses, Plaintiff must establish (1) an implied misrepresentation or conduct by Defendant; (2) promoted knowingly and willingly by the Defendant; (3) creating a contrived and misleading understanding of the transaction on the part of Plaintiff; (4) which wrongfully induced the Plaintiff to advance money, property, or credit to the defendant. *In re Chase*, 372 B.R. at 128 (citing *Sandak v. Dobrayel (In re Dobrayel)*, 287 B.R. 3, 12 (Bankr. S.D.N.Y. 2002)).

27. A false pretense is an implied misrepresentation, not an express oral or written misrepresentation. *See In re Chase*, 372 B.R. at 128 (citing *Bobilya Chrysler v. Gross (In re Gross)*, 175 B.R. 277 (Bankr. N.D. Ind. 1994) (stating that causes of action for "false pretenses" and "false representations" under subsection 523(a)(2)(A) are two distinct actions; the former involves implied misrepresentations, while the latter deals with expressed, either oral or written, misrepresentations).

28. Plaintiff has not presented any facts that would support a finding that the Defendant made implied misrepresentations or engaged in conduct that fostered a false or misleading impression with respect to the Defendant's financial wherewithal.

Rather, Plaintiff points to the Defendant's express written representation that there were sufficient funds in his bank account to cover the amount of the counter checks.

29. An express written representation is not analyzed under the "false pretense" prong of subsection 523(a)(2)(A) of the Bankruptcy Code. *See In re Chase*, 372 B.R. at 128; *see also Vidomlanski v. Gabor (In re Gabor)*, 2009 Bankr. LEXIS 3110, at *13 (Bankr. S.D.N.Y. Oct. 8, 2009) ("In contrast to false pretenses, a 'false representation' references an expressed statement, either oral or written, false and misleading and designed to deceive."). Plaintiff does not allege anything other than an express written representation. Therefore, Plaintiff fails to state a claim based on the "false pretenses" prong of subsection 523(a)(2)(A).

(ii) False Representation

30. A court can find a false representation if a plaintiff presents proof that the defendant (1) made a false or misleading statement; (2) with the intent to deceive; and (3) in order for the plaintiff to turn over money or property to the defendant. *See In re Chase*, 372 B.R. at 129 (citing *In re Dobrayel*, 287 B.R. at 12).

31. Although Defendant's alleged statement standing alone might survive a motion to dismiss by plausibly being a false or misleading statement with intent to deceive, in order for the Plaintiff to turn over money or property, the inquiry does not so simply end. Justifiable reliance is an essential element of a false representation claim under section 523(a)(2)(A). *See In re Gonzalez*, 241 B.R. 67, 71 (S.D.N.Y. 1999) ("To exempt a debt from discharge under Section 523(a)(2)(A), the non-debtor's reliance must be 'justifiable' under the circumstances.") (citing *Field v. Mans*, 516 U.S. 59 (1995)); *see also In re Gabor*, 2009 Bankr. LEXIS 3110 at *14 ("Both false representations and actual fraud require [a showing of]. . . justifiable reliance by the plaintiff.").

32. In discussing what constitutes "justifiable reliance" for purposes of subsection 523(a)(2)(A), the Supreme Court stated:

> Justifiability is not without some limits, however. . . . [A] person is required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.

Field, 516 U.S. at 70-72 (citations and quotations omitted) (emphasis added). Here, the Plaintiff has failed to plead any facts which assert, much less establish, "justifiable reliance."

33. The Complaint's omission of any statement of justifiable reliance is fatal. Because Plaintiff has failed to assert this essential element of its claim, a claim based on a false representation under section 523(a)(2)(A) must be dismissed.

(iii) Actual Fraud

34. "[A]ctual fraud" generally requires proving the "five fingers of fraud." *In re Dobrayel*, 287 B.R. at 12. The Court looks to the common law of torts in construing the elements of 523(a)(2)(A). *In re Alicea*, 230 B.R. at 500 (citing *Field*, 516 U.S. at 70 (1995); *Palmacci v. Umpierrez*, 121 F.3d 781, 786 (1st Cir 1997); *In re Apte*, 96 F.3d 1319, 1324 (9th Cir. 1996)). The elements of common law fraud are (1) a misrepresentation, (2) fraudulent intent, or scienter, (3) intent to induce reliance, (4) justifiable reliance, and (5) damage. *See In re Alicea*, 230 B.R. at 500 (citing *Palmacci v. Umpierrez*, 121 F.3d 781, 786 (1st Cir 1997); *see also In re Gabor*, 2009 Bankr. LEXIS at *13-14; *In re Gonzalez*, 241 B.R. at 71-72.

35. Here again, the issue is whether Plaintiff has sufficiently pled justifiable reliance on the Defendant's alleged misrepresentation. As discussed above, Plaintiff has failed to plead any facts with respect to this element.

36. Because Plaintiff has failed to plead all of the elements necessary to establish a cause of action under the "false pretenses," "false representation," or "actual fraud" prongs of subsection 523(a)(2)(A) of the Bankruptcy Code, Count I of the Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rules 12(b)(6) and 9(b).

II. THE SECTION 727 CLAIMS IN COUNT II OF THE COMPLAINT SHOULD BE DISMISSED

37. Count II of the Complaint asserts Defendant should be denied a discharge based on unspecified false oaths or false accounts made in connection with his chapter 7 case, and an unspecified failure of Defendant to explain a deficiency of assets to meet Defendant's liabilities. As the Discharge Order has been entered by this Court and is now a final order, Plaintiff is barred by principles of *res judicata* from challenging Defendant's right to a general discharge by means of this adversary proceeding. Plaintiff's failure to object to entry of the Discharge Order, or seek an appeal thereof, bars Plaintiff from collaterally attacking such order now through the Complaint.

38. Moreover, even if Plaintiff's section 727 claims were not barred, as demonstrated below, the Complaint (a) fails to plead a false oath or account under subsection 727(a)(4) at all, much less with particularity; and (b) fails to allege any deficiency in Defendant's assets under subsection 727(a)(5). Accordingly, Count II must be dismissed.

A. The Discharge Order must be afforded *res judicata* effect.

39. This Court entered the Discharge Order on January 11, 2010, granting Defendant a discharge under section 727 of the Bankruptcy Code. Plaintiff cannot relitigate the issue of Defendant's discharge through the Complaint. Plaintiff had

an opportunity to object to the entry of the Discharge Order and did not. Therefore, Plaintiff is forever bound by the Discharge Order and cannot collaterally attack it by the Complaint. Unlike claims under section 523 of the Bankruptcy Code, there is no carve-out for section 727 claims from a final section 727 discharge.

40. "Under the doctrine of *res judicata*, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *EDP Med. Computer Sys. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007) (quoting *St. Pierre v. Dyer*, 208 F.3d 394, 399 (2d Cir. 2000) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981))); *G & T Terminal Packaging Co., Inc. v. Consol. Rail Corp.*, 719 F. Supp. 153, 157 (S.D.N.Y. 1989). "The doctrine of *res judicata* applies 'with equal force to final judgments rendered by the bankruptcy courts.'" *In re Indesco Int'l, Inc.*, 354 B.R. 660, 664 (Bankr. S.D.N.Y. 2006) (citations omitted).

41. "The doctrine of *res judicata* 'bars later litigation if an earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action.'" *Esquire Trade & Fin., Inc. v. CBQ, Inc.*, 562 F.3d 516, 520 (2d Cir. 2009) (citing *EDP Med. Computer*, 480 F.3d at 624).

42. Here, the Discharge Order is a valid and final judgment, was rendered by a court of competent jurisdiction, involved the identical parties, and decided the same issues presented by the section 727 claims.

43. The section 727 claims in the Complaint are an impermissible collateral attack on a valid and final judgment in a prior proceeding, and are thus contrary

to principles of *res judicata*. The Discharge Order is a valid, final order and the Court's determination to grant the Defendant a general discharge is binding on Plaintiff and not subject to collateral attack before this Court. Plaintiff's proper remedy upon entry of the Discharge Order was to appeal the Discharge Order.

B. Plaintiff has failed to plead any facts supporting its claim under subsection 727(a)(4) of the Bankruptcy Code.

44. Even if Plaintiff's subsection 727(a)(4) claim was not barred by *res judicata*, the claim should be dismissed for Plaintiff's failure to properly plead facts in support of Plaintiff's claim. To establish a claim under subsection 727(a)(4), Plaintiff must show that (i) the debtor made a statement under oath; (ii) the statement was false; (iii) the debtor knew the statement was false; (iv) the debtor made the statement with fraudulent intent; and (v) the statement related materially to the bankruptcy case. *See Republic Credit Corp. I v. Boyer (In re Boyer)*, 328 Fed. Appx. 711, 715 (2d Cir. 2009) (citing *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000)).

45. Allegations under section 727(a)(4) must meet the requirements of Rule 9(b). "[O]bjections based on section 727(a)(4)(A) sound in fraud, and must comply with the special pleading requirements contained in Fed. R. Civ. P. 9(b), made applicable by Fed. R. Bankr. P. 7009." *Migoscha, S.A. v. Meffert (In re Meffert)*, 232 B.R. 71, 74 (Bankr. S.D.N.Y. 1998) (citations omitted). *See also Demas v. Demas*, 150 B.R. 323, 328 (Bankr. S.D.N.Y. 1993) ("plaintiff's contention that the debtor is not entitled to a discharge under 11 U.S.C. §§ 727(a)(4)(A) . . . because he knowingly made a false accounting of his assets and withheld information relating to his financial condition, is deficient under Rule 9(b) because it does not articulate in what manner the debtor's financial statements are deficient and what material has been withheld.").

46. A false oath or account may consist of a false statement or omission in a debtor's schedules or a false statement by the debtor at an examination at a creditor's meeting under section 341 of the Bankruptcy Code. *See In re Klutchko*, 338 B.R. 554, 567 (Bankr. S.D.N.Y. 2005) (citing *Mondore v. Mondore* (*In re Mondore)*, 326 B.R. 214, 216 (Bankr. W.D.N.Y. 2005)); *Congress Talcott Corp. v. Sicari (In re Sicari)*, 187 B.R. 861, 880 (Bankr. S.D.N.Y. 1994). Because Rule 9(b) applies, however, Plaintiff must allege a false oath or statement with particularity. It is not enough to generally allege that a false oath or statement has been made. *See Riumbau v. Colodner (In re Colodner)*, 147 B.R. 90, 94 (Bankr. S.D.N.Y. 1992) (dismissing claims under section 724(a)(4) where complaint failed to allege any document signed under oath or any false claim made in connection with chapter 7 case).

47. Although the Complaint recites the language of subsection 727(a)(4) of the Bankruptcy Code regarding a false oath and a false account, it fails to identify any document signed by the Defendant under oath, in connection with his chapter 7 case, which is alleged to be false, or specify which account the Defendant gave, in connection with his chapter 7 case, which was false. By definition in subsection 727(a)(4) of the Bankruptcy Code, the false oath or claim must have been made "in or in connection with the case." 11 U.S.C. § 727(a)(4). Hence, the claim based on this subsection must be dismissed pursuant to Rules 12(b)(6) and 9(b).

C. Plaintiff has failed to plead any facts supporting its claim under subsection 727(a)(5) of the Bankruptcy Code.

48. With respect to Plaintiff's claim under subsection 727(a)(5), the Complaint fails to specify any assets belonging to the Defendant which were either lost or diminished, and for which the Defendant has failed to give a satisfactory explanation.

Merely copying the elements of a statute in a complaint is insufficient to satisfy federal pleading standards. *See In re O.P.M. Leasing Servs., Inc.*, 32 B.R. 199, 204 (Bankr. S.D.N.Y. 1983); *see also Iqbal*, 129 S.Ct. at 1945 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

49. Indeed, the Complaint does nothing more than paraphrase the statute, stating the Defendant "has failed to explain satisfactorily any deficiency of assets to met [sic] his liabilities in violation of Section 727(a)(5) of the United States Bankruptcy Code, by understating the value of certain of his assets, overstating his liabilities and therefore misstating his financial condition." Compl., Count II at ¶ 2. A complaint that fails to specify a deficiency of assets cannot survive a motion to dismiss. *See In re Colodner*, 147 B.R. at 94-95 (finding complaint insufficient when it failed to set forth specific assets of the debtor that were either lost or diminished).

50. The failure of the Complaint to allege any facts supporting the diminution or loss of any of the Defendant's assets or that the Defendant failed to give a satisfactory explanation for the deficiency or loss of any of his assets requires dismissal of the subsection 727(a)(5) claims.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests the Court grant this motion to dismiss, and/or such other relief as is appropriate.

Dated: March 1, 2010
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 1, 2010, a true and correct copy of the Defendant's Motion to Dismiss was served (i) by United States first-class mail, postage prepaid, on the parties listed below; and (ii) by electronic mail on the parties who receive electronic notice in this case pursuant to the Court's ECF filing system.

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